IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-15231

CITIZENS FOR FREE SPEECH, LLC and MICHAEL SHAW,
Plaintiffs-Appellants,
v.
COUNTY OF ALAMEDA; ALAMEDA COUNTY EAST COUNTY BOARD OF ZONING ADJUSTMENTS; FRANK J. IMHOFF, SCOTT BEYER, and MATTHEW B. FORD, in their official capacities as members of the Alameda County East County Board of Zoning Adjustments,
Defendants-Appellees.

APPELLANTS' OPENING BRIEF

D.C. No. 4:18-cv-00834-SBA
U.S. District Court Northern District of California, Oakland

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellants state as follows:

CITIZENS FOR FREE SPEECH, LLC, does not have a parent company and no publicly held corporation owns 10% or more of its stock.

REQUEST FOR ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a)(2), Appellants hereby request oral argument due to the complexity of the issues and the magnitude of the errors presented for the Court's consideration.

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STATEMENT OF JURISDICTION

The district court had jurisdiction over Appellants CITIZENS FOR FREE SPEECH, LLC and MICHAEL SHAW (collectively "Citizens") civil rights claims under 28 U.S.C. §§ 1331 and 1343(a)(3).

This Court has jurisdiction over this appeal of the district court's order granting Defendant/Appellee's COUNTY OF ALAMEDA; ALAMEDA COUNTY EAST COUNTY BOARD OF ZONING ADJUSTMENTS; FRANK J. IMHOFF, SCOTT BEYER, and MATTHEW B. FORD, in their official capacities as members of the Alameda County East County Board of Zoning Adjustments' (collectively the "County") Motion for Attorneys' Fees ("Motion") pursuant to 28 U.S.C. § 1291, because this appeal concerns a final order of the district court in awarding attorneys' fees pursuant to 42 U.S.C. §1988. The district court filed its Order granting the Motion to Dismiss Citizens' Complaint on September 4, 2018, Judgment was rendered against Citizens on September 4, 2018, and the order granting the Motion was entered on January 14, 2019 ("Order"). Citizens timely filed their notice of appeal on February 8, 2019.

ISSUES PRESENTED FOR REVIEW

1. Did the district court abuse its discretion in concluding that

Citizens' claims were "frivolous, unreasonable, or groundless" in awarding attorneys' fees to the County?

2. The district court abuse its discretion in concluding that the County met its burden to establish that the number of hours applied to the lodestar calculation was reasonable?

STATEMENT OF THE CASE

Plaintiffs-Appellants Citizens for Free Speech, LLC and Michael Shaw ("Citizens") filed a Complaint for Civil Rights Violations against the County on February 8, 2018. Among other things, Citizens sought declaratory and injunctive relief preventing the County from utilizing the County's administrative process to remove and demolish existing billboards constructed by Citizens (hereinafter the "Signs"). On March 7, 2018, Citizens filed a Motion for Preliminary Injunction, contending that the County was barred from using its administrative process to abate the Signs on the basis that the County was obligated to bring an abatement/nuisance mandatory counterclaim against Citizens in a 2014 action between the parties in the district court which involved the same Signs and the County's unconstitutional sign ordinance. The County failed to raise the issue in the prior litigation before Judgment was entered in Citizens' favor. Because

that issue could have been raised by the County in the prior action, the pending abatement procedure should have barred by Fed. R. Civ. P. 13(a), and the doctrine of res judicata.

On May 9, 2018, the district court denied Citizens' Motion for Preliminary Injunction without a hearing, rejecting the Rule 13(a) argument and finding that Citizens suffered no immediate harm.

On June 21, 2018, the County filed a Motion to Dismiss, seeking dismissal of each of Citizens' claims for relief. On September 4, 2018, the district court concluded that (a) Younger abstention justified dismissal of Citizens' claims, (b) Citizens' Rule 13(a) argument was without merit, and (c) Citizens' res judicata argument was without merit. The district court granted the Motion to Dismiss dismissing each of Citizens' claims, and rendering Judgment in favor of the County. Citizens appealed the Judgment and denial of the Motion for Preliminary Injunction (Case No. 18-16805).

After the Judgment was entered, the County filed its Motion for Attorneys' Fees on September 18, 2018. The district court entered its Order granting the Motion on January 14, 2019. Citizens timely appealed the Order.

STATEMENT OF FACTS

The facts are generally not in dispute. Plaintiff/Appellant Michael Shaw is the owner of a parcel of land located at 8555 Dublin Canyon Road within the County (the "Parcel"). Excerpt of Record (hereinafter "ER") Vol. 1, p. 306. In 2014, Plaintiff/Appellant Citizens for Free Speech, LLC, entered into an agreement with Shaw for the construction and display of billboards on the Parcel. ER Vol. 2, p. 387.

One sign, displaying on-premises commercial speech advertising for Shaw's on-site business, has been lawfully maintained on the Parcel since the time the business commenced operations. ER Vol. 2, p. 389.

In 2014, Citizens constructed three signs and supporting structures on the Parcel per the agreement with Shaw (the "Signs"). ER Vol. 2, p. 426. The messages displayed on the signs originally consisted wholly of noncommercial, political speech intended to challenge the political ideology espoused by County officials. ER Vol. 2, p. 387.

The County has promulgated certain ordinances, known as the Alameda County Code of Ordinances (the "Code"). ER Vol. 2, p. 426. The Code purports to regulate the display of signs in unincorporated areas of the County. ER Vol. 2, pp. 326-349. Under the Code, all new advertising

signs are banned within the SC. ER Vol. 2, pp. 344-349.

A. The Prior Action.

On June 1, 2014, Citizens filed suit in United States District Court for the Northern District of California (Oakland), Case No. 4:14-cv-02513, (the "Prior Action"), naming the County as defendant. ER Vol. 2, p. 354. In the Prior Action, Citizens alleged that the Code's regulation of signs violated Citizens' rights to free speech and equal protection under the First and Fourteenth Amendments to the United States Constitution, and prayed that the County be enjoined from any and all conduct enforcing the unconstitutional Code to prohibit, encumber, or penalize Citizens' Signs. ER Vol. 2, pp. 354-363. Citizens prayed for "actual damages according to proof at trial; For additional actual, consequential, and other special damages in an amount according to proof at trial." ER Vol. 2, p. 363.

In response to the Prior Action and the construction of the Signs, on June 11, 2014, Shaw received a "Declaration of Public Nuisance – Notice to Abate" (2014 Notice) from the Alameda County Community Development Agency Planning Commission, dated June 2, 2014, signed by Paul da Silva, Investigator of the Code Enforcement Division. ER Vol. 2, p. 388, p. 392. The 2014 Notice asserted that Shaw was in violation of "Alameda County

Zoning Ordinance Section 17.18.010 and 17.18.120." ER Vol. 2, p. 388, p. 392. The 2014 Notice ordered that the signs be removed within ten days from the postmarked date of the notice. *Id.* The 2014 Notice also threatened fines and an abatement hearing if the Signs were not removed. *Id.*

On July 16, 2015, the district court in the Prior Action entered an order denying, in part, the County's motion for summary judgment, finding Code section 17.18.130 unconstitutionally conferred unfettered discretion in County officials. *Citizens for Free Speech, LLC, v. County of Alameda*, 114 F.Supp.3d 952, 963 (N.D. Cal. 2015). The County responded by amending the section on September 29, 2015, removing the unfettered discretion of the County officials. ER Vol. 2, pp. 454 and Addendum pp. 001-002.

In the Prior Action, both the County and Citizens argued the constitutionality and application of Code §17.18.120. ER Vol. 2, pp. 462-463. In response to Citizens' Motion for Summary Judgment, the County contended that:

> "The signs were in violation of section 17.18.120 when they were erected, and they continue to be in violation of that section. Unless plaintiffs follow the County's procedure for seeking approval of new uses for the property, the County has an obligation to pursue abatement procedures."

ER Vol. 2, p. 485.

Further, the County conceded that "[t]he essence of plaintiffs' claims in [the Prior Action] is that, although the signs were in conflict with section 17.18.120, the procedure which the County had established at that time for consideration of the plaintiffs' right to erect the signs was constitutionally deficient . . . .' ER Vol. 2, p. 486.

The district court in the Prior Action confirmed that the County argued that Citizens violated Code §17.18.120: "County argues that it was actually section 17.18.120 . . . with which Plaintiffs failed to comply." ER Vol. 2, pp. 462-463.

Prior to the Judgment, the County considered taking action to remove the Signs. The district court in the Prior Action noted that, "the County stated at the motion hearing that it is considering the removal of Citizens' signs and that the dissolution of the preliminary injunction 'frees [it] up' to take such action." ER Vol. 2, p. 440.

On July 8, 2016, the district court in the Prior Action entered its order granting in part, and denying in part, Citizens' Motion for Summary Judgment. ER Vol. 2, pp. 451-476; and ER Vol. 1, p. 251. Among other findings, the district court concluded that Citizens were entitled to

summary judgment as to their "Equal Protection challenge to section 17.52.520(A) . . . because that section is content-based and cannot withstand strict scrutiny." *Id.*

On July 8, 2016, pursuant to the success of Citizens' equal protection claim, the district court entered its Order Granting Motion for Damages and Attorneys' Fees in favor of Citizens ("Damages Order"). ER Vol. 2, pp. 451-476; ER Vol. 2, pp. 433-450. In the Damages Order, the district court confirmed, under "the law of the circuit" that Citizens were entitled to damages and attorneys' fees. *Id.* The district court confirmed that Citizens' "prayer for relief in the Complaint sought, among other things, 'actual, consequential, and other special damages in an amount according to proof at trial' and 'such other and further relief as the Court deems just, equitable, and proper.'" ER Vol. 2, p 367. The district court concluded that:

> "Citizens prevailed on its equal protection claim based on section 17.52.520(A), which privileged government speech over speech by private speakers, like Citizens. Accordingly, Citizens is entitled to nominal damages. The Court will award Citizens nominal damages of one dollar to acknowledge the 'importance to organized society' that its constitutional rights "be scrupulously observed.'"

ER Vol. 2, pp. 369-370.

The district court confirmed that "The County's amendment of

section 17.52.520(A) to correct the unconstitutional language favoring speech by public officials is a tangible result that Citizens achieved 'in addition to obtaining a judgment for nominal damages.'" (citations omitted) ER Vol. 2, pp. 372-373. The district court further concluded that "the equal protection claim that Citizens prevailed upon is significant," (ER Vol. 2, p. 373) and "the County's subsequent amendment of the section was legally significant, as it served to correct an unconstitutional ordinance dealing with both the equal protection clause and the First Amendment, important public issues. The public will (theoretically) benefit by having a constitutional zoning ordinance in place." ER Vol. 2, pp. 373-374.

The district awarded Citizens attorneys' fees and costs. ER Vol. 2, p. 381. A final Judgment ("Judgment") was entered on March 8, 2017. ER Vol. 4, p. 383.

The County did not file a counterclaim in the Prior Action. ER Vol. 2, pp. 350-353.

B. <u>The 2017 Notice to Abate and the 2018 Action</u>.

On or about October 6, 2017, Appellant Michael Shaw received a "Declaration of Public Nuisance – Notice to Abate" from the Alameda County Community Development Agency Planning Commission, dated

September 28, 2017, signed by Paul da Silva, Investigator of the Code Enforcement Division, and Rodrigo Orduna, Assistant Planning Director & Code Enforcement Officer ("2017 Notice"). ER Vol. 2, p. 390; Vol. 2, pp. 393-394. The 2017 Notice is substantially similar to the 2014 Notice, in that it: (1) determines that the Signs violate Code §17.18.120, (2) orders that the Signs be removed within ten days from the postmarked date of the Notice, (3) failure to cure the violations will result in monetary penalties, and (4) provides the opportunity to appeal. *Id.*

In November, 2017, Plaintiff Shaw received a "Notice of Administrative Hearing on Abatement of Nuisance" ("2017 Notice of Hearing") from the Alameda County Community Development Agency Planning Commission, dated November 22, 2017, and signed by Rodrigo Orduna, Code Enforcement Division. ER Vol. 2, pp. 395-396; ER Vol. 2, p. 390; ER Vol. 2, pp. 395-397, ER Vol. 2, p. 398. The 2017 Notice of Hearing stated that a hearing was set before the Alameda County East County Board of Zoning Adjustments (hereinafter the "Board"), to determine whether the Signs violated the Code (the "Hearing"). *Id.* The 2017 Notice of Hearing explains that if the Signs are determined to constitute public nuisance: the Signs will be abated by way of demolition of the signs and support

structures; Appellant Shaw will be cited for violation of the Code; and the costs of the administrative process will be assessed to Shaw and will constitute a lien on his property until paid. ER Vol. 2, pp. 395-396; ER Vol. 2, p. 390; ER Vol. 2, pp. 395-397, ER Vol. 2, p. 398.

Originally set for December 7, 2017, the Hearing was postponed by stipulation, pending the resolution of Citizens' Motion for Preliminary Injunction. ER Vol. 2, p. 385. However, the County has not agreed to suspend abatement of the Signs pending resolution of this appeal. ER Vol. 2, p. 273. Instead, the County confirmed only that it would not abate the Signs "until the conclusion of the County's administrative proceeding."

1. The County's Abatement Procedure.

The County's administrative procedure for abatement of signs is contained in Chapter 17.59 of the Alameda County Ordinance Code, entitled the "Abatement Procedures." Addendum pp. 003-011. The code provides that if an enforcement officer deems a property to constitute a nuisance, the property owner is to receive a notice to abate. §17.59.030. In the event the property owner refuses to abate the nuisance, the County shall hold a hearing before the Board. §17.59.040. The Board does not consist of judicial officers, but instead consists of citizens selected by County officials.

If, after a hearing, the Board determines that a nuisance exists, it may enter an order for abatement of the nuisance. §17.59.060. The order includes the right to appeal to the County Board of Supervisors, an elected body. §17.59.090. After a hearing held by the Board of Supervisors, a resolution may be entered setting forth the conditions of the abatement with timing requirements. §17.59.100. A property owner may appeal a Board of Supervisors order within thirty days. §17.59.120. The Abatement Procedure does not contain a provision which permits the property owner to seek and obtain an automatic stay of the enforcement of the abatement order pending a decision from a judicial officer. The Abatement Procedure permits the County to abate a sign deemed to be a nuisance without the requirement that a judicial officer evaluate the abatement order from the Board of Supervisors.

The Abatement Procedure also provides that "Nothing in this chapter shall be deemed to prevent the Board of Supervisors from ordering the commencement of a civil proceeding to abate a public nuisance pursuant to applicable law." §17.59.190.

2. The 2018 Action.

On February 2, 2018, Citizens filed a Complaint against the County

and the Board members, in the case from which this appeal is derived. *Citizens for Free Speech, LLC v. Alameda County et. al.*, Case No. 18-cv-00834 SBA (the "2018 Action"). The Complaint alleges five claims pursuant to 42 U.S.C. § 1983: (1) violation of the right to free speech; (2) violation of due process; (3) violation of the right to free speech; (4) violation of the Equal Protection Clause, and (5) attorney's fees under 42 U.S.C. § 1988. ER Vol. 2, pp. 424-432. In addition to the affirmative claims, Citizens seek injunctive and declaratory relief that, among other things, the Hearing and abatement proceeding is barred by the doctrine of *res judicata* and Fed. R. Civ. P. 13(a). ER Vol. 2, p. 431.

Citizens filed a Motion for Preliminary Injunction (ER Vol. 2, pp. 399-423), seeking to enjoin the County from conducting the Hearing and attempting to abate the signs during the pendency of the 2018 Action. The County opposed the Motion (ER Vol. 2, pp. 300-323), and Citizens filed a Reply. ER Vol. 1, pp. 200-216. On May 9, 2018, the district court entered its Order denying the Motion. ER Vol. 1, pp. 222-232. Citizens filed a timely Preliminary Injunction Appeal pursuant to Circuit Rule 3-3. ER Vol. 1, pp. 218-221.

While the appeal of the denial of the Motion for Preliminary

Injunction was pending, Citizens filed a First Amended Complaint. ER Vol. 1, pp. 200-217 (Doc#42). In response to the First Amended Complaint, the County filed a Motion to Dismiss Citizens' First Amended Complaint. ER Volume 1, pp. 175-179 Citizens opposed the Motion. ER Volume 1, pp. 159-174. The County filed a Reply. ER Volume 1, pp. 150-158. On September 4, 2018, the district court granted the Motion to Dismiss. ER Volume 1, pp. 132-149. On September 4, 2018, the district court entered Judgment in favor of the County and against Citizens. ER Volume 1, p. 131. On September 20, 2018, Citizens filed a timely notice of appeal. ER Volume 1, pp. 046-078.

After the Judgment was entered, the County filed its Motion for Attorneys' Fees on September 18, 2018. ER Volume 1, pp. 079-095. The district court entered its Order granting the Motion on January 14, 2019. Citizens timely appealed the Order. ER Volume 1, pp. 004-025.

SUMMARY OF ARGUMENT

The district court abused its discretion in granting the County's Motion for Attorney's Fees. The County's Motion sought over $101,174 in attorney's fees for 333 hours of lawyer time. The district court granted the Motion upon reaching the conclusion that Citizens' claims were (1)

"unreasonable . . . bring[ing] claims in this action aimed at precluding the County from taking further action to enforce its zoning laws," and (2) "frivolous, unreasonable or groundless." ER Volume 1, p. 12:1-3. The district court then accepted the County's proposed lodestar calculation that 333 hours of lawyer time was reasonable despite the district court's acknowledgement that the County's lawyers spent more than 100 hours preparing an opposition to Citizens' Motion for Preliminary Injunction, and over 100 hours preparing the Motion to Dismiss. ER Volume 1, p. 24:3-6.

This case did not present the "exceptional circumstance" that justified a fee award against a non-prevailing civil rights plaintiff. The chilling effect of such large awards will prevent claimants from pursuing legitimate – even if not ultimately successful – claims under 42 U.S.C. §1983.

The County, as the prevailing defendant in Citizens' 42 U.S.C. §1983 action, may be awarded attorneys' fees under 42 U.S.C. §1988 only if Citizens' action was "frivolous, unreasonable, or without foundation." *Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1060 (9th Cir. 2006) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). In concluding that this standard was met, the district court ignored the requirement that if not engage in 'post hoc reasoning by concluding that,

because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Id.* The district court erred in concluding that fees were appropriate because, "[a] case may be deemed frivolous only when the 'result is obvious or the ... arguments of error are wholly without merit.'" *Karam v. City of Burbank*, 352 F.3d 1188, 1195 (9th Cir. 2003) (quoting *McConnell v. Critchlow*, 661 F.2d 116, 118 (9th Cir. 1981). This case was not appropriate for the award of fees which, "in civil rights cases should only be awarded to a defendant in exceptional circumstances." *Barry v. Fowler*, 902 F.2d 770, 773 (9th Cir. 1990). For the reasons set forth in the submitted briefing in Citizens' appeal of the underlying Judgment (Case No. 18-16805), Citizens' claims were not frivolous nor wholly without merit.

Second, the district court ignored the fact that it was the County's burden to establish the reasonableness of its fee request under the lodestar calculations. *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1202 (9th Cir. 2013); *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008). The district court shifted the burden to Citizens to disprove the lodestar calculation and in doing so abused its discretion in refusing to genuinely evaluate the County's attorneys' fee submission, which was facially

excessive.

ARGUMENT

A. Standard of Review

This Court reviews a district court's decision to grant or deny an award of attorneys' fees for abuse of discretion. *Moore v. Permanente Med. Group, Inc.*, 981 F.2d 443, 447 (9th Cir.1992).

The amount of fees awarded is reviewed for an abuse of discretion. *Barry v. Fowler*, 902 F.2d 770, 773 (9th Cir. 1990)

B. The District Court Abused Its Discretion in Awarding Fees Based on Its Flawed Analysis of *Younger Abstention*.

The district court evaluated whether Citizens' claims against the County warranted an award of fees both under the district court's application of *Younger* abstention, and as applied to the individual claims. ER Volume 1, pp. 10-12:. The district court, after analyzing its assessment of *Younger*, found that it was "unreasonable for [Citizens] to bring claims in this action aimed at precluding the County from taking further action to enforce its zoning laws. ER Volume 1, p. 12. The district court then concluded that, based on the unreasonableness of Citizens' claims in light of *Younger*, that fees were properly awarded. *Id.* This was an abuse of

discretion. First, the district court's *Younger* analysis was flawed. Second, the district court awarded fees under a "reasonableness standard", and not the heightened standard required under §1988 jurisprudence. Third, the district court had already entered an order denying Citizens' Motion for Preliminary Injunction in which the court exercised jurisdiction. The County never pursued Younger Abstention in either its Opposition to Citizen's Motion for Preliminary Injunction or its Motion to Dismiss. Thus, the County waived its right to assert Younger as a basis for dismissal. Further, the district court's subsequent refusal to exercise jurisdiction by abstaining and dismissing the claims was an abuse of discretion.

1. The District Court's Younger analysis was flawed.

The district court raised the Younger Abstention issue sua sponte in its Order granting the County's Motion to Dismiss. ER Vol. 1, p. 139). Neither party briefed *Younger* as an avenue for dismissal of Citizens' claims. The district court concluded that "[t]he record clearly establishes the presence of all elements for Younger abstention," but then applied the incorrect elements of Younger as it applies to civil cases. *Id*. The district court applied *San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose*, 546 F.3d 1087, 1092 (9th Cir. 2008), for

the proposition that "the federal courts must abstain under Younger if the following requirements are satisfied:

> (1) a state-initiated proceeding is ongoing; (2) the proceeding implicates important state interests; (3) the federal plaintiff is not barred from litigating federal constitutional issues in the state proceeding; and (4) the federal court action would enjoin the proceeding or have the practical effect of doing so, i.e., would interfere with the state proceeding in a way that Younger disapproves.

(ER Vol. 1, p. 139) (citing *City of San Jose*, 546 F.3d at 1092.). This was clear error because the elements of *Younger* were not met. First, neither party briefed the district court on whether the *Younger* abstention doctrine should apply to this case, as set forth originally in *Younger v. Harris*, 401 U.S. 37 (1971). Accordingly, neither party provided any factual support for the elements of *Younger*, and the record contains no facts in support of the second element of the *Younger* doctrine.

In the Order granting the Motion to Dismiss, the district court applied *San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose*, 546 F.3d 1087, 1092 (9th Cir. 2008), for the proposition that "the federal courts must abstain under Younger if the following requirements are satisfied:

> (1) a state-initiated proceeding is ongoing; (2) the proceeding implicates important state interests; (3) the

> federal plaintiff is not barred from litigating federal constitutional issues in the state proceeding; and (4) the federal court action would enjoin the proceeding or have the practical effect of doing so, i.e., would interfere with the state proceeding in a way that Younger disapproves.

(ER Vol. 1, p. 139) (citing *City of San Jose*, 546 F.3d at 1092.)

As this Court has clarified in *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 759 (9th Cir. 2014), there is "a five-prong test to determine when Younger abstention should apply to a civil case." *Rynearson v. Ferguson*, 903 F.3d 920, 924 (9th Cir. 2018). Specifically, in a civil case, "Younger abstention is appropriate only when the state proceedings: (1) are ongoing, (2) **are quasi-criminal enforcement actions or involve a state's interest in enforcing the orders and judgments of its courts**, (3) implicate an important state interest, and (4) allow litigants to raise federal challenges." *Id.* (citing *ReadyLink*, 754 F.3d at 759) (emphasis added). If these four threshold elements are established, this Court then considers a fifth prong: (5) "whether the federal action would have the practical effect of enjoining the state proceedings and whether an exception to Younger applies." *Id.* Each of these requirements must be "strictly met." *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1148 (9th Cir. 2007). Both the Supreme Court and this Circuit "have

repeatedly emphasized, however, that *Younger* abstention is 'an extraordinary and narrow exception to the general rule that federal courts have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Id.* (citing *Potrero Hills Landfill, Inc. v. County of Solano*, 657 F.3d 876, 882 (9th Cir. 2011)). "Each of these requirements must be 'strictly met.'" *Id.* at 925. (citing *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1148 (9th Cir. 2007)).

There was no presentation by the County, and no analysis by the district court, that the five applicable elements of *Younger* justified dismissal of the Complaint. Specifically, the second element was not – and cannot – be met here. The County has not alleged, let alone shown, that the 2017 Hearing and administrative abatement proceeding is quasi-criminal in nature. Without such an allegation or showing of this element, the second element of *Younger* abstention was not met.

Further, there has been no presentation by the County, and no other facts in the record to support the district court's conclusion that the 2017 Notice and Hearing, "involve a state's interest in enforcing the orders and judgments of its courts."

Because the district court applied the wrong elements of *Younger* to

this civil case, and there are no facts in the record supporting the district court's conclusions that all the elements of *Younger* have been met, the district court committed clear legal error in dismissing Citizens' First Amended Complaint on the basis of *Younger*.

The district court attempted to remedy its error in the Order granting the Motion for Attorneys' Fees by simply concluding, without any briefing or factual presentation in the record, that the abatement proceeding is "quasi-criminal." ER Volume 1, p. 11.

2. The District Court abused its discretion in awarded fees under Younger using an "Unreasonableness" Test.

The district court found that it was "unreasonable" for Citizens to maintain its claims aimed at precluding the County's abatement enforcement action. ER Volume 1, p. 12. Then, the district court concluded that "the County should recover its attorneys' fees based on the decision to bring claims seeking relief beyond the scope of the [district court's] jurisdiction." ER Volume 1, p. 12. The district court abused its discretion by awarding fees under an incorrect "reasonableness" standard. Applying the incorrect legal standard is an abuse of discretion. *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1257 (9th Cir.2004).

Civil rights laws must strike a balance between chilling legitimate

actions on the one hand and indulging unfounded accusations on the other. *Blue v. Dep't of Army*, 914 F.2d 525, 535 (4th Cir. 1990). Because of this required balance, there must be different standards for prevailing defendants to recover fees in civil rights cases than for prevailing plaintiffs. *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1654 (2016). Thus, Defendants may recover attorneys' fees only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). Accordingly, there are only three bases for assessing fees against a plaintiff in a §1983 action: frivolity, unreasonableness, or lack of foundation. "Without foundation" does not appear to be a term of art, but the Supreme Court has explained that:

> it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success.

Id. at 421-22.

The district court appeared to grant the motion on the basis that Citizens' claims were unreasonable based on the district court's perceived

jurisdictional defects. ER Volume 1, p. 12. Both "frivolous" and "unreasonable" are terms of art in the law. "Courts should therefore ask whether the action was irrational, capricious, not guided by reason, not serious, or not reasonably purposeful." *Watson v. Cty. of Yavapai*, 240 F. Supp. 3d 996, 1000 (D. Ariz. 2017).

Under this standard, attorneys' fees should only be awarded in "exceptional circumstances," *Harris v. Maricopa Cty. Superior Court*, 631 F.3d 963, 971 (9th Cir. 2011), in order to avoid chilling civil rights litigation, *Tutor–Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1063 (9th Cir. 2006). Importantly, "Tenuous" or "extremely weak" claims do not meet this standard; only claims with "no legal or factual basis" do so. *Buckheit v. Dennis*, 573 Fed.Appx. 662, 664 (9th Cir. 2014) (citing *Christiansberg*, 434 U.S. at 422. While the claim need not be brought in subjective bad faith to merit a fee award, *Christiansberg*, 434 U.S. at 421, "[t]he fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees," *Hughes*, 449 U.S. at 14.

The district court's Order awarding fees under the Younger analysis finds only that Citizens' efforts were "unreasonable," but does not explain that the claims were so "irrational, capricious, not guided by reason, not

serious, or not reasonably purposeful" as to meet the exceptional situation of "unreasonable" in which prevailing Defendants should be awarded fees. Accordingly, the findings in the Order does not support the conclusion.

Nor does the district court explain why, if Citizens' jurisdictional failings were so obviously unreasonable, why the County did identify nor raise the issue in any of its briefs to the district court. "Defendants requesting attorneys' fees from a plaintiff in a civil rights action must meet a heightened standard." *Manufactured Home Communities Inc. v. City of San Jose*, 420 F.3d 1022, 1036 (9th Cir. 2005) (citing *Hughes v. Rowe*, 449 U.S. 5, 14 (1980)). Where, as here, the "the district court overlooked the heightened standard set by the Supreme Court for awarding attorneys' fees and applied the wrong legal standard for granting fees," the district court abused its discretion in awarding attorneys' fees based on the district court's jurisdictional and *Younger* analysis. *Id*. at 1036-37.

3. *The District Court had already exercised jurisdiction by entering its Order Denying Citizens' Motion for Preliminary Injunction without referencing Younger; the County waived its right to rely on Younger as a proper basis for dismissal*.

Where, as here, the County consented to the jurisdiction of the federal courts, application of Younger abstention was an abuse of discretion.

Further, the County never raised *Younger* abstention as a basis for dismissal, and therefore waived the same. Finally, the district court exercised jurisdiction by deciding Citizens' Motion for Preliminary Injunction without referring to *Younger*. For these reasons, dismissing Citizens' claims based on Younger was an abuse of discretion. *Younger* abstention is not jurisdictional. Rather, it is a prudential limitation designed to preserve comity between state and federal courts. See *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 626, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986) (stating that Younger abstention "does not arise from lack of jurisdiction in the District Court, but from strong policies counseling against the exercise of such jurisdiction where particular kinds of state proceedings have already been commenced"); Thus, Younger abstention may be waived. See *Ohio Civil Rights Comm'n*, 477 U.S. at 626, 106 S.Ct. 2718 (noting that a state may submit to federal jurisdiction in spite of a tenable abstention claim or waive that abstention claim).

In addition to express waiver, courts have found waiver or forfeiture of the right to Younger abstention for failure to timely raise Younger. See *Walnut Properties, Inc. v. Whittier*, 861 F.2d 1102, 1106–07 (9th Cir.1988)

(noting that Younger abstention did not apply because the state court voluntarily stayed its own proceedings pending resolution of the case in federal court; adding that "a decision to abstain at this late date would result in such duplicious [sic] litigation and waste of resources that it would greatly frustrate our interests in judicial economy, with no apparent justification"); *Kendall–Jackson Winery, Ltd. v. Branson*, 212 F.3d 995, 997 (7th Cir.2000) (concluding that a state did not affirmatively waive the benefits of abstention but that it forfeited application of the doctrine by declining to appeal).

Here, the County never raised *Younger* abstention in any filing until after the Court had already dismissed Citizens' claims. Accordingly, the County waived its right to rely on *Younger* as a basis for dismissal.

Finally, the district court's election to rely on *Younger* abstention after the parties had already engaged in substantial litigation actually defeated the purpose of *Younger* abstention in the first place. It does not appear clear in this Circuit whether a district court has discretion to apply Younger late in the federal proceedings, but even if it does, courts appear to generally consider competing "fairness considerations," *Smith v. Metropolitan Property and Liability Ins. Co.*, 483 F.Supp. 673, 678

(D.Conn.1980) (discussing abstention by a federal court to secure a decision from the state courts); whether abstention would result in "duplicitous litigation and waste of resources," *Walnut Properties*, 861 F.2d at 1107 (discussing Younger abstention); and whether belated abstention would serve the "purposes that animate the abstention principle." *Spivey v. Barry*, 665 F.2d 1222, 1229 (D.C.Cir.1981). Were the County or the Court to "litigate the case on the merits, and then belatedly claim [Younger abstention] to avoid an adverse result, [this] would 'work a virtual fraud on the federal court and opposing litigants.' " *Hill v. Blind Industries and Services of Maryland*, 179 F.3d 754, 758 (9th Cir.1999).

For the district court to apply *Younger* after it had already ruled on substantive issues raised by the parties without a single mention of *Younger*, the district court's belated application of *Younger* was an abuse of discretion.

C. The District Court Abused Its Discretion in Concluding that Citizens' Due Process Claims Were Frivolous.

The primary thrust of Citizens' contentions in the First Amended Complaint, and in the Motion for Preliminary Injunction, were that the abatement procedures commenced by the County, as evidenced by the 2017 Notice and 2017 Notice of Hearing, are barred by Fed. R. Civ. Pro. 13(a) and

res judicata. (ER Vol. 1, pp. 205-206). The other claims – challenges to the Code and equal protection – were secondary claims included to backstop against the possibility that the district court concluded that the Prior Action did not preclude the County's abatement efforts. ER Volume 1, p. 160. Citizens conceded that those claims would be barred if the district court properly applied res judicata to bar the County's abatement claims. *Id.*

In their due process claim, Citizens alleged that the Prior Action involved the County's contention that the Signs violated §17.18.120 of the Code, and as such, the County was required to assert an abatement counterclaim in accordance with Rule 13(a). ER Volume 1, pp. 164-169. Citizens contended that the facts that gave rise to the Prior Action are virtually identical to those on which the County now bases its administrative abatement action. *Id.* Citizens alleged that in response to the construction of the Signs, the County served the 2014 Notice, asserting violations of §17.18.120. After the Judgment was obtained in the Prior Action, the County served a subsequent notice, the 2017 Notice, which is substantially similar to the 2014 Notice, alleging that the Signs violated §17.18.120. (ER Vol. 1, p. 203)

Accordingly, Citizens contended to the district court that the 2017

Notice "arises out of the transaction or occurrence that is the subject matter" of the Prior Action. Fed. R. Civ. P. 13(a). Citizens contended that this clearly establishes a "logical relationship" between the two sets of facts, and therefore establishes Rule 13(a) is implicated to bar any subsequent claims brought by the County after the conclusion of the Prior Action. The district court ignored these contentions.

In response to Citizens' Rule 13(a) argument, the County did not contend that the 2017 Notice arose from different transactions that were at issue in the Prior Action. Instead, the County argued only that Rule 13(a) does not apply to bar a subsequent administrative proceeding, and, confusingly, that res judicata bars Citizens' 13(a) argument. (ER Vol. 1, pp. 152-153.)

In neither the Order granting the County's Motion to Dismiss nor the Order awarding attorneys' fees did the district court properly acknowledge that the 2014 Notice (which was litigated in the Prior Action) and the 2017 Notice (the subject of the pending Abatement Procedure) arose from the same transaction. (ER Vol. 1, pp. 144-147). The district court simply concluded that, the County had no obligation to file a counterclaim because (1) it "would have been superfluous," for the County to assert a

counterclaim for the opposite of the declaratory relief sought by Citizens. ER Volume 1, p. 19 (citing *Intercon Sols., Inc. v. Basel Action Network, 969 F. Supp. 2d 1026, 1065 (N.D. Ill. 2013)*); (2) that "fundamentally, the notion that Rule 13(a) dictates where and when the County may enforce its laws is legally untenable." ER Volume 1, p. 19; and (3) the 2017 Notice and Hearing are not "actions" under Rule 13(a) and thus, the Rule cannot be applied to prevent the administrative abatement action. ER Volume 1, p. 20. These conclusions were clear legal error for the reasons set forth in the prior appeal (Case No. 18-16805).

The district court compounded these errors in its Order, finding that "there is no factual overlap between [Citizens'] claims in the Prior Action and the County's administrative proceeding." ER Volume 1, p. 18. Substantial evidence provides no support for such a conclusion. The County acknowledged in its filings in the Prior Action that it maintained an intent and desire to commence an abatement proceeding to remove the Signs. ER Vol. 2, p. 440. The County explained to the district court in the Prior Action that once the injunction was dissolved, it intended to seek abatement proceedings. *Id*. The County could have, and should have, asserted an abatement/nuisance counterclaim in the Prior Action.

The district court concluded that the Rule 13(a) claim was "baseless" under the contention that a mandatory counterclaim by the County would have been "superfluous." ER Volume 1, p. 19. The conclusion by the district court in determining that the County had no obligation to file a counterclaim arrives from the analysis that it would have been superfluous for the County to file a counterclaim in the Prior Action "to establish the opposite" of Citizens' claims of the unconstitutionality of the County's Sign Code. (ER Vol. 1, p. 145). The district court concluded in the Order dismissing Citizens' claims that "it would have been duplicative, if not inappropriate" for the County to file a counterclaim to "adjudicate issues that already were at issue in the administrative action." *Id.* There is no federal case authority interpreting Rule 13(a) as limited in this manner. More critically, the district court can only reach its erroneous conclusion by incorrectly stating that the Prior Action was only a declaratory relief action and nothing more. *Id.* The fact that Citizens sought damages in the Prior Action, in addition to declaratory relief, renders the district court's analysis wholly inapposite.

The case cited by the district court to support its conclusion has no application to the facts of this case. In *Intercon Sols., Inc. v. Basel Action*

Network, 969 F. Supp. 2d 1026, 1065 (N.D. Ill. 2013), the district court was asked to dismiss a counterclaim under the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., when a substantive action was already pending which would have had the practical effect of giving declaratory relief to both parties. *Id.* ("Where, as here, 'the substantive suit' would resolve the issues raised by the declaratory judgment action, the declaratory judgment action 'serves no useful purpose' because the controversy has 'ripened' and the uncertainty and anticipation of litigation are alleviated.") The rationale offered by the district court was based solely on the premise that a declaratory relief counterclaim is superfluous when the counterclaim is nothing more than assertion of the "opposite effect of the complaint." *Id.*

These facts and conclusions of *Intercon* have no relevance here. As set forth above, the Prior Action contained First Amendment challenges to the County Code. Citizens sought damages, declaratory relief, and injunctive relief. After cross-motions for summary judgment, the district court found the Code to be unconstitutional, entering Judgment in Citizens' favor. ER Vol. 2, pp. 451-476. Citizens were awarded nominal damages and attorneys' fees. ER Vol, 2 pp. 433-450. The Prior Action was not merely a declaratory relief action on the constitutionality of the Sign Code,

it was an action at law for damages.

Moreover, the 2017 Notice and Hearing from the County did not seek only declaratory relief. The County, through both its 2014 Notice and 2017 Notice, seek to adjudicate a nuisance and to forcibly remove Citizens' property. The abatement procedures are not merely the flipside of the Prior Action, and the district court's conclusion that the Rule 13(a) argument was baseless was an abuse of discretion.

D. The District Court Abused Its Discretion in Accepting the County's Facially Excessive Lodestar Calculation.

This Circuit utilizes the "lodestar" approach for assessing reasonable attorneys' fees, where the number of hours reasonably expended is multiplied by a reasonable hourly rate. *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1202 (9th Cir. 2013); *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008). The district court then may adjust the lodestar upward or downward based upon a variety of factors. *Gonzalez*, 729 F.3d at 1202. In determining a reasonable fee, the district court must take into account the factors set forth in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975): (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the

attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client and (12) awards in similar cases. *McGrath v. County of Nevada*, 67 F.3d 248, 252 (9th Cir. 1995). The district court may make upward or downward adjustments to the lodestar based on consideration of the *Kerr* factors.

Citizens contended to the district court that the amount of fees sought by the County was clearly excessive. ER Volume 1, pp. 042-044. While the district court acknowledged that the County bore the burden of proving that the lodestar calculation was reasonable (ER Volume 1, p. 22), the district court then improperly shifted the burden to Citizens to prove through "specific examples of redundant billing" that the fee amount sought was excessive (ER Volume 1, p. 23). This burden shifting was an abuse of discretion.

First, the district court shifted the burden of proving the reasonableness of the lodestar calculations to Citizens. ER Volume 1, p. 23.

The district court acknowledged that Citizens calculated the County's fee request and identified that the County sought over 100 hours of attorney time for the Motion to Dismiss and another 100 hours for the Opposition to the Motion for Preliminary Injunction. ER Volume 1, p. 23. The district court agreed with Citizens that facially the amounts appeared high. However, rather than requiring the County to carry the burden to establish the necessity and reasonableness of the facially high fee request, the district court simply ignored the apparent excessiveness of the hours and accepted them. ER Volume 1, p. 23. This conclusion had the practical effect of shifting the burden to Citizens to prove that the County's lodestar was not reasonable. This burden shifting was an abuse of discretion.

Second, the fees sought were clearly excessive. Citizens base this contention in part on the County's own assessment of the utter lack of merit of Citizens' claims. If, as the County has contended, Citizens claims were so patently meritless, it should be estopped from contending that the 333.7 lawyer hours spent on this case were necessary or reasonable.

Moreover, the case docket evidences that there were only four material events which required substantial attorney time: (1) Responding to the First Amended Complaint by way of Motion to Dismiss, (2) conducting

the Case Management Conference and Scheduling Conference, (3) opposing the Motion for Preliminary Injunction and appeal therefrom, and (4) the instant Motion for fees. The billing statement attached to the Motion evidences the fact that multiple attorneys were tasked with identical projects, often simultaneously, and billing redundant time. ER Volume 1, pp. 104-130.

The district court acknowledged that at least three lawyers spent well in excess of 100 hours researching and drafting the opposition to the Motion for Preliminary Injunction. ER Volume 1, p. 24. The Motion to Dismiss, which merely re-worked the opposition to the preliminary injunction and included references to the Court's Order, appears to consist of well over another 100 hours. ER Volume 1, pp. 104-110.

Review of the billing statements establishes that the County simply cannot justify under lodestar and *Kerr* that 333 hours were reasonably incurred in defense of this case. Simply because the County is willing to pay three lawyers to simultaneously bill for the same work does not make it reasonable under lodestar. The district court abused its discretion in awarding the County's entire request for fees in the amount of $101,174.40.

CONCLUSION

The district court abused its discretion in awarding fees in favor of the County as a prevailing party defendant under 42 U.S.C. §1988. The district court incorrectly applied the *Younger* abstention elements, and incorrectly analyzed the doctrine of res judicata and Rule 13(a) to determine that Citizens' claims were frivolous, unreasonable, and/or groundless. Citizens respectfully request this Court reverse the order of the district court, and remand this case with instructions to deny the Motion for Attorneys' Fees.

DATED: This 9th day of May, 2019.

ROBISON, SHARP, SULLIVAN & BRUST
71 Washington Street
Reno, Nevada 89503

/s/ Frank C. Gilmore
FRANK C. GILMORE, ESQ.
California Bar No. 283859
Attorneys for Plaintiffs-Appellants- CITIZENS FOR FREE SPEECH, LLC and MICHAEL SHAW

STATEMENT OF RELATED CASES

Plaintiff/Appellant is aware of one related case currently pending in this Court, namely:

Citizens for Free Speech, LLC, and Michael Shaw v. County of Alameda et al., Case No. 18-16805, appealed from the U.S. District Court Northern District of California, Oakland, Case No. D.C. No. 4:18-cv-00834-SBA.

The related case involves the appeal of the district court's substantive order granting the County's Motion to Dismiss and resulting Judgment.

The instant appeal involves the district court's post-Judgment award of attorneys' fees in favor of the County.

DATED: This 9th day of May, 2019.

ROBISON, SHARP, SULLIVAN & BRUST
71 Washington Street
Reno, Nevada 89503

/s/ Frank C. Gilmore
FRANK C. GILMORE, ESQ.
California Bar No. 283859
Attorneys for Plaintiffs-Appellants- CITIZENS FOR FREE SPEECH, LLC and MICHAEL SHAW

CERTIFICATE OF COMPLIANCE TO
FED R. APP. 32(a)(7)(C) and CIRCUIT RULE 32-1

I certify that, pursuant to Fed. R. App. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Opening Brief is proportionately spaced with a typeface of 14 points or more, in Georgia font, generated in the MICROSOFT WORD processing software and contains approximately 9,143 words.

DATED: This 9th day of May, 2019.

ROBISON, SHARP, SULLIVAN & BRUST
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/s/ Frank C. Gilmore
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ADDENDUM

ADDENDUM

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Addendum

Alameda County Code Section 17.18.130

Alameda County Ordinance Code

Title 17 - ZONING

Chapter 17.18 - PD DISTRICTS

17.18.130 - Modification of the land use and development plan.

If an applicant proposes a change to a land use and development plan approved by the Board of Supervisors in accordance with Section 17.18.020 of this chapter, the change may be permitted subject to securing a conditional use permit as provided by Section 17.54.135 of this title. For purposes of considering such a conditional use permit, in addition to the findings required by Section 17.54.135, the planning commission shall only authorize a conditional use permit if it finds that:

A. The proposed change does not increase:

1. The number of housing units beyond that permitted in the existing land use and development plan;
2. The number of, or size of, structures;
3. The number of, or size of, accessory structures;
4. Signage (number and/or aggregate sign area); or
5. The floor area ratio of the structures permitted in the existing land use and development plan.

B. The original land use and development plan was approved less than five years ago;

C. The proposed change does not reduce public infrastructure provided in the land use and development plan;

D. The proposed change does not reduce public uses such as community centers, public parks or open spaces;

E. The proposed change does not have an adverse financial impact on the county, including the provision of services;

F. The proposed change does not involve uses not previously approved for the project.

The planning commission shall adopt a statement or resolution of findings for each criteria required for issuance of a conditional use permit. A planning commission decision pursuant to this section is subject to appeal pursuant to Section 17.54.670.

(Ord. 2006-36 § 1 (part): Ord. 2004-61 § 1 (part): prior gen. code § 8-31.18)

(Ord. No. O-2015-47, § 1, 9-29-15)

Addendum

Alameda County Code Chapter 17.59
Abatement Procedures

Alameda County Ordinance Code

Title 17 - ZONING

Chapter 17.59 - ABATEMENT PROCEDURES[3]

Editor's note— Ord. No. 2010-71 , § 108, renamed Chapter 17.59, from abatement of procedures to abatement procedures.

17.59.010 - Declaration of public nuisance by enforcement officer.

Any property found by the enforcement officer to be maintained in violation of Title 17 is declared to be a public nuisance and shall be abated by rehabilitation, removal, demolition, or repair pursuant to the procedures set forth herein. The procedures for abatement set forth herein shall not be exclusive and shall not in any manner limit or restrict the county from enforcing other county ordinances or abating public nuisances in any other manner provided by law.

(Ord. 2004-13 § 2 (part))

17.59.020 - Notification of nuisance.

Whenever the enforcement officer determines that any property within the county is being maintained contrary to one or more of the provisions of Title 17, the enforcement officer shall give written notice in accordance with provisions of Section 17.59.030 covering service in person or by mail.

(Ord. 2004-13 § 2 (part))

17.59.030 - Notice to abate.

Notice to abate shall be provided in person or by pre-paid certified mail, return receipt requested and shall include a copy of this chapter and a statement describing the section(s) found to be violated. It shall further set forth a reasonable time for correcting the violation(s), but in no event less than ten nor more than sixty (60) calendar days and may also set forth suggested methods of correcting the same. The enforcement officer shall inspect the property within the time limit for correcting the violation(s) to determine whether the violation(s) has been corrected. If the property is found to be in compliance with this chapter, the matter will be dropped and no further enforcement action taken. If the property is not found to be in compliance with this chapter, further enforcement action shall occur as set forth herein.

(Ord. 2004-13 § 2 (part))

(Ord. No. 2009-32 , 7-21-09)

17.59.040 - Administrative hearing to abate nuisance.

In the event said owner shall fail, neglect or refuse to comply with notice to abate a nuisance, an administrative hearing shall be conducted.

(Ord. 2004-13 § 2 (part))

17.59.050 - Notice of hearing.

Notice of said hearing shall be served upon the owner not less than seven calendar days before the time fixed for the hearing. Notice of hearing shall be served in person, or by prepaid certified mail, return receipt requested to the owner's last known address. Service shall be deemed to be complete at the time notice is personally served or deposited in the mail. Failure of any person to receive notice shall not affect the validity of any proceedings hereunder. Notice shall be substantially in the format set forth below.

COUNTY OF ALAMEDA
NOTICE OF ADMINISTRATIVE HEARING
ON ABATEMENT OF NUISANCE

This is a notice of hearing before the board of zoning adjustments to ascertain whether certain property situated in the County of Alameda, state of California, known and designated as (street address) in said county and more particularly described as (assessor's parcel number) constitutes a public nuisance subject to abatement by the rehabilitation of such property or by the repair removal or demolition and removal of buildings situated hereon. If said property in whole or part, is found to constitute a public nuisance as defined in this chapter and the same is not promptly abated by the owner, such nuisance may be abated by the County of Alameda, in which case the cost of such rehabilitation, repair, removal or demolition will be assessed upon such property and such costs together with interest thereon, will constitute a lien upon such property until paid; in addition, you the owner(s) may be cited for violation of the provisions of county ordinances and subject to a fine.

Said alleged conditions consist of the following:

In violation of Alameda County General Ordinance Code section(s):

The recommended method(s) of abatement are:

All persons having an interest in said matters may attend the hearing and their testimony and evidence will be heard and given due consideration.

Dated this _____ day of _____, 20 _____ .

Board of Zoning Adjustments

Time and Date of Hearing: _____

Location of Hearing: _____

(Ord. 2004-13 § 2 (part))

(Ord. No. 2010-71 , § 110, 12-21-10)

17.59.060 - Administrative hearing by board of zoning adjustments.

At the time stated in the notice, the board of zoning adjustments shall hear and consider all relevant evidence, objections or protests, and shall receive testimony relative to such alleged public nuisance and to proposed rehabilitation, repair, removal or demolition of such property. Said hearing may be continued from time to time.

If the board of zoning adjustments finds that such public nuisance does exist and that there is sufficient cause to rehabilitate, demolish, remove or repair the nuisance, the enforcement officer shall prepare findings and an order for the board of zoning adjustments adoption, which shall specify the nature of the nuisance, the methods(s) of abatement and the time within which the work shall be commenced and completed which shall not exceed sixty (60) calendar days. The order shall include reference to the right to appeal set forth in Section 17.59.090

(Ord. 2004-13 § 2 (part))

17.59.070 - Service of board of zoning adjustments order to abate.

A copy of the findings and order shall be served on all owners of the subject properly in the same manner as provided for notice of hearing in Section 17.59.050. In addition, a copy of the findings and order shall be forthwith conspicuously posted on or near the property.

(Ord. 2004-13 § 2 (part))

17.59.080 - Procedure—No appeal.

In the absence of any appeal, the nuisance shall be abated in the manner and means specifically set forth in said findings and order. In the event the owner fails to abate the nuisance as ordered, the enforcement officer shall cause the nuisance to be abated by county employees or private contract. The costs shall be billed to the owner as specified in Section 17.59.140.

(Ord. 2004-13 § 2 (part))

17.59.090 - Procedure—Appeal to Board of Supervisors.

The owner(s) may appeal to the Alameda County Board of Supervisors the board of zoning adjustments findings and order by filing an appeal with the clerk of the board within ten calendar days from the date of service of the board of zoning adjustments decision. The appeal shall contain:

A. A specific identification of the subject property;

B. The names and addresses of all appellants;

C. A statement of appellant's legal interest in the subject property;

D. A statement of ordinary and concise language of the specific order or action protested and the grounds for appeal, together with all material facts and support thereof;

E. The date and signatures of all appellants; and

F. The verification of at least one appellant as to the truth of the matters stated in the appeal.

As soon as practicable after receiving the appeal, the clerk of the board shall set a date for the Board of Supervisors to hear the appeal which date shall not be less than seven calendar days from the date the appeal was filed. The clerk of the board shall give each appellant written notice of the time and the place of the hearing at least five calendar days prior to the date of the hearing either by causing a copy of the notice to be delivered to the appellant personally or by mailing a copy thereof, postage prepaid, addressed to the appellant at the address(es) shown on the appeal. Continuances of the hearing from time to time may be granted by the Board of Supervisors on request of the owner for good cause shown, or on the Board of Supervisors' own motion.

(Ord. 2004-13 § 2 (part))

(Ord. No. 2010-71 , § 111, 12-21-10)

17.59.100 - Decision by Board of Supervisors.

Upon the conclusion of the hearing, the Board of Supervisors shall determine whether the property or any part thereof as maintained constitutes a public nuisance if a public nuisance is found the Board of Supervisors shall adopt a resolution declaring such property to be a public nuisance setting forth its findings and ordering the abatement of the same by having such property rehabilitated, repaired or demolished and removed in the manner and means specifically set forth in said resolution. The resolution

shall set forth the time within which such work shall be completed by the owner, in no event less than three calendar days. The decision and order of the Board of Supervisors shall be final.

(Ord. 2004-13 § 2 (part))

17.59.110 - Service of Board of Supervisors order to abate.

A copy of the resolution of the Board of Supervisors ordering the abatement of said nuisance shall be served upon the owner of said property in the same manner as provided for notice of hearing in Section 17.59.050. Upon abatement in full by the owner as determined by the county the proceeding hereunder shall terminate.

(Ord. 2004-13 § 2 (part))

17.59.120 - Limitation of filing judicial action.

Any action appealing the Board of Supervisors decision and order shall be commenced within thirty (30) calendar days of the date of service of the decision.

(Ord. 2004-13 § 2 (part))

17.59.130 - Procedure—Hearing before board of zoning adjustments and Board of Supervisors.

A. All hearings shall be electronically tape recorded.

B. Hearings need not be conducted according to the California Code of Evidence.

C. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but shall not be sufficient in itself to support finding unless it would be admissible over objection in civil actions in courts of competent jurisdiction in this state. Any relevant evidence shall be admitted if it is the type of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions in courts of competent jurisdiction in the state.

D. Irrelevant and unduly repetitious evidence shall be excluded.

(Ord. 2004-13 § 2 (part))

(Ord. No. 2010-71 , § 112, 12-21-10)

17.59.140 - Abatement by county.

A. If such nuisance not abated as ordered within said abatement period, the enforcement officer shall cause the same to be abated by county employees or private contract. The enforcement officer, county employees and/or private contractor are expressly authorized to enter upon said property for such purposes. The cost of abating the nuisance shall be billed to the owner and shall become due and payable to the enforcement agency thirty (30) calendar days thereafter.

B. No person(s) shall obstruct, impede or interfere with the enforcement officer or designated representative, or with any person who owns or holds any interest or estate in any property in the performing of any necessary act, preliminary to or incidental, carrying out an abatement order issued pursuant to Sections 17.59.010, 17.59.050 and 17.59.080.

(Ord. 2004-13 § 2 (part))

17.59.150 - Powers of abatement.

No property shall be found to be a public nuisance under Section 17.59.010 and ordered demolished unless there is no reasonable way other than demolition and removal to correct such nuisance, as determined by the county.

(Ord. 2004-13 § 2 (part))

17.59.160 - Notice of intent to demolish.

A copy of any order or resolution requiring abatement by demolition under Sections 17.59.060 and 17.59.100 shall be recorded with the Alameda County recorder.

(Ord. 2004-13 § 2 (part))

17.59.170 - Record of cost of abatement.

The enforcement officer shall keep an account of the cost, including incidental expenses, of abating such nuisance on each separate lot or parcel of land where the work is done by or under contract with the county and shall render an itemized report in writing to the Board of Supervisors showing the cost of abatement, including the rehabilitation, demolition and all nuisances removed; or repair of said property provided that before said report is submitted to the Board of Supervisors copy of the same shall be posted for at least five days upon or in front of property hereinafter described, to be removed, repaired or demolished in order to abate a public nuisance on said real property together with a notice of the time when said report shall be heard by the Board of Supervisors for continuation. A copy of said report and notice shall be served upon the owner of said property in accordance with the provisions of Section 17.59.050 at least five calendar days prior to submitting the same to the Board of Supervisors. Proof of said posting and service shall be made by affidavit filed with the clerk of the board.

(Ord. 2004-13 § 2 (part))

17.59.180 - Assessment lien.

A. The total cost of abating such nuisance as so confirmed by the Board of Supervisors, shall constitute a special assessment against the respective lot or parcel of land to which it relates, and upon recordation in the office of the county recorder of a notice lien, as so made and confirmed, shall constitute a lien on said property for the amount of such assessment.

B. After such confirmation and recordation, a certified copy of the Board of Supervisors' decision shall be filed with the Alameda County auditor-controller. For filings made on or before August 1st each year, it shall be the duty of said auditor-controller to add the amounts of the respective assessments to the next regular tax bills levied against said respective lots and parcels of land for municipal purposes and thereafter said amounts shall be collected at the same time and in the same manner as ordinary property taxes are collected, and shall be subject to the same penalties and the same procedure and sale in case of delinquency as provided for ordinary property taxes. Filings made after August 1st shall apply to the following year's regular tax bills. All laws applicable to the levy collection and enforcement of property taxes shall be applicable to such special assessment.

C. In the alternative, after such recordation, such lien may be foreclosed by judicial or other sale in the manner and means provided by law.

D. Such notice of lien for recordation shall be in form substantially as follows:

NOTICE OF LIEN

(Claim of County of Alameda)

Pursuant to the authority vested by the provisions of Section _____ of Alameda County Ordinance No_____, the board of zoning adjustments of the County of Alameda did on or about the day of _____, 20_____ cause the property hereinafter described, to be rehabilitated or the building or structure on the property hereinafter described, to be removed, repaired or demolished in order to abate a public nuisance on said real property; and the Board of Supervisors of the County of Alameda did on the day of _____, 20____, assess the cost of such rehabilitation, removal, repair or demolition upon the real property hereinafter described, and the same has not been paid nor any part thereof, and that said County of Alameda does hereby claim a lien on such rehabilitation, removal, repair or demolition in the amount of said assessment, to wit the sum of $ _____; and the same, shall be a lien upon said real property until the same has been paid in full and discharged of record.

The real property hereinabove mentioned, and upon which a lien is claimed, is that certain parcel of land lying and being in the County of Alameda, state of California, and particularly described as follows:

(description)

Dated this ____ day of _____, 20___.

Board of Zoning Adjustments, County of Alameda.

(Ord. 2004-13 § 2 (part))

(Ord. No. 2010-71 , § 113, 12-21-10)

17.59.190 - Alternative actions available.

Nothing in this chapter shall be deemed to prevent the Board of Supervisors from ordering the commencement of a civil proceeding to abate a public nuisance pursuant to applicable law.

(Ord. 2004-13 § 2 (part))

(Ord. No. 2010-71 , § 109, 12-21-10; Ord. No. 2009-32 , 7-21-09)

17.59.200 - Violation and penalties.

A. Any person, firm or corporation shall be guilty of a separate offense for each and every day during any portion of which any violation of any provision of this title is committed, continued or permitted by such person and shall be punishable accordingly.

B. The enforcement officer shall have the power to designate particular officers or employees to enforce particular provisions of this title. Officers or employees so designated shall have the authority to impose fines and/or fees.

C. If the planning director determines that a nuisance does not necessitate immediate summary abatement under the procedures set forth in Section 17.59.040 et seq., the nuisance shall be deemed a violation and fines or fees will be imposed on the owner of the property and/or anyone known to the planning director to be in possession of the property.

D. The following is a schedule of fines and fees:

	Fines and Fees

Initial inspection fee (to verify violation)	None
Re-inspection fee (violation corrected)	None
Re-inspection fee (violation not corrected)	1 hour staff time
Each additional inspection fee	1 hour staff time
Administrative hearing/public nuisance hearing fee (board of zoning adjustments)	$50.00
Fee for appeals to the board of supervisors	$25.00
Abatement fees	Staff time plus actual abatement costs
Fine for violations of non-permitted uses in any district	$250.00 for 1st failed re-inspection
	$500.00 for 2nd failed re-inspection
	$1,000.00 for 3rd failed re-inspection
	$1,500.00 for 4th and subsequent failed re-inspections
Fine for violations of non-permitted uses in any district that remain beyond six months (penalty will be assessed every six (6) months until violations are corrected)	$5,000.00

The owner(s) may appeal to the board of zoning adjustments any fines or fees imposed by the enforcement officer by filing an appeal with the planning department within ten calendar days from the mailing date of written notification of the action. Staff time shall be billed at the rate noted on the most current Alameda County Community Development Agency Planning Department Billable Rate schedule.

(Ord. 2004-13 § 2 (part))

(Ord. No. 2009-32 , 7-21-09)

CERTIFICATE OF SERVICE

U.S. Court of Appeal Docket:
No. No. 19-15231

I hereby certify that I am an employee of Robison, Sharp, Sullivan & Brust and that on this date I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

DATED: This 9th day of May, 2019

/s/ Mary Carroll Davis
MARY CARROLL DAVIS